

Nov 15, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES A. CLEMENTS; and JASON
CLEMENTS,

Plaintiffs,

v.

CONFEDERATED TRIBES OF THE
COLVILLE RESERVATION; and
COURT OF THE CONFEDERATED
TRIBES OF THE COLVILLE
RESERVATION,

Defendants.

NO: 2:19-CV-201-RMP

ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION AND FOR
FAILURE TO STATE A CLAIM

BEFORE THE COURT is a Motion to Dismiss, ECF No. 8, by Defendants the Confederated Tribes of the Colville Reservation ("the Tribes") and the Court of the Confederated Tribes of the Colville Reservation ("the Tribal Court"). Defendants seek dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. Rule 12(b)(1), and for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The Court has reviewed the Complaint, the parties' submissions, and the relevant

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1 law. The Court further heard oral argument on the motion on November 14, 2019,
2 in Spokane. Accordingly, the Court is fully informed and grants the motion.

3 BACKGROUND

4 Plaintiff James Clements formed South Bay Excavating, Inc. (“South Bay”) in 1987. ECF No. 1 at 3. The Olympia, Washington, company provided
5 excavation services. *Id.* Jason Clements became a shareholder and an officer of
6 South Bay in 2006.¹

8 In November 2016, Defendant the Tribes entered into a “Contract for Repair
9 and/or Construction Services” with South Bay to complete the “CTCR 12 Fiber
10 Projects” for the Tribes (“the Contract”). ECF No. 9-1. Jason signed the Contract
11 for South Bay as Vice President of the company. ECF No. 9-1 at 17. The Contract
12 was executed in Nespelem, Washington, where the Tribes are headquartered, and
13 provided for South Bay’s installation of optical fiber cable for \$2,457,194, with
14 payments remitted to South Bay on a detailed schedule and a scheduled completion
15 date of October 31, 2017. ECF No. 9-1 at 1, 5, 16. The Contract obliged South
16 Bay, as the “Contractor,” to “be solely responsible for all construction under this
17 Contract, including the techniques, sequences, procedures, and means for
18 coordination of all work.” *Id.* at 9. The Contract further provided for the “Tribal

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21 ¹ The Court hereinafter refers to Plaintiffs by their first names for clarity.

1 Courts of the Colville Confederated Tribes” to have “sole and exclusive
2 jurisdiction over disputes arising from the Contract.” ECF No. 9-1 at 14.

3 Following execution of the Contract, the Tribes allegedly paid South Bay for
4 work pursuant to the Contract. ECF No. 9-2 at 7. The Tribes allege that South
5 Bay “walked off of the job” on approximately June 1, 2017, without notice and
6 without any indication of how it would complete the project. ECF No. 9-3 at 2;
7 *see also* ECF No. 9-2 at 7 (alleging that work ceased on June 2, 2017). In a letter
8 dated June 22, 2017, the South Sound Bank, out of Olympia, Washington, notified
9 the Tribes that the bank was exercising its “rights to collect any amounts” that the
10 Tribes owed to South Bay, “until further notice.” ECF No. 9-4 at 2.

11 On July 6, 2017, Liquid Networks, Inc. (“Liquid Networks”) was registered
12 as a Washington corporation. ECF No. 9-5 at 2. By letter dated July 7, 2017, a
13 law firm representing Liquid Networks informed the Tribes that Liquid Networks
14 had been assigned the Contract from South Bay. ECF No. 9-6 at 2. The letter
15 further stated that Liquid Networks intended “to resume work on the project on or
16 around July 10th and will adhere to the same terms and conditions for the ‘CTCR
17 12 Fiber Projects’ Contract.” *Id.* On July 11, 2017, James, for assignor South Bay,
18 and Jason, for assignee Liquid Networks, signed an Assignment of Contract in
19 which Liquid Networks allegedly assumed South Bay’s rights, duties, and
20 obligations under the Contract with the Tribes. ECF No. 9-7 at 2. In Defendants’
21 instant motion they allege that the “creation of Liquid Networks and assignment of

1 the Contract appear to have been done solely to evade collections efforts by South
2 Sound Bank.” ECF No. 9 at 4.

3 On approximately August 28, 2017, the Tribes addressed a letter to James,
4 as President of South Bay, seeking return of approximately \$385,000 that the
5 Tribes allegedly had paid South Bay toward work that South Bay had not
6 performed and payment of \$25,000 in allegedly outstanding fees owed to the
7 Tribal Employment Rights Office (“TERO”). ECF No. 9-3 at 2.

8 The Tribes filed a Civil Complaint with the Tribal Court on January 5, 2018.
9 ECF No. 9-2 at 4–79. The Tribes named South Bay, Liquid Networks, and the
10 Clements as defendants. *Id.* The Clements moved to dismiss the Tribes’ claims
11 against them individually for lack of personal and subject matter jurisdiction. ECF
12 No. 1 at 5. The Tribal Court denied the motion on May 17, 2018, finding that the
13 “issue of whether James and Jason Clements are personally liable for allegedly
14 breaching the contract is necessarily a dispute ‘arising from’ the contract” and
15 dismissal would not be appropriate “until the Tribes have presented their case at
16 trial.” ECF No. 9-8 at 6–7.

17 The Clements sought interlocutory appeal of the Tribal Court’s denial of the
18 motion to dismiss. ECF No. 9-9 at 3. On March 19, 2019, the Colville Tribal
19 Court of Appeals found that the question of whether the tribal courts should
20 “pierce the corporate veil” and find personal jurisdiction over the Clements
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1 individually was “not ripe for interlocutory appeal” and remained a “matter for the
2 fact-finder at the trial level.” ECF No. 9-9 at 3.

3 Plaintiffs filed their Complaint in this Court on June 5, 2019, alleging that
4 Plaintiffs had exhausted their tribal court remedies. ECF No. 1 at 2. Plaintiffs
5 seek relief, allegedly as “interested parties” within the meaning of 28 U.S.C. §
6 2201, in the form of a declaratory judgment that the tribal court lacks jurisdiction
7 over Plaintiffs and an injunction prohibiting the tribal court from adjudicating the
8 claims brought against the Plaintiffs by the Tribes. *Id.* at 2, 5–8. Furthermore,
9 Plaintiffs assert subject matter jurisdiction under 28 U.S.C. § 1331. *Id.* at 3.

10 **DISMISSAL STANDARDS**

11 ***Fed. R. Civ. P. 12(b)(1)***

12 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life*
13 *Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A court will dismiss a complaint under
14 Fed. R. Civ. P. 12(b)(1) upon finding that the court lacks jurisdiction over the
15 subject matter of the suit. As a general rule, a court may dismiss a complaint *sua*
16 *sponte* upon finding that it lacks subject matter jurisdiction. *See Pistor v. Garcia*,
17 791 F.3d 1104, 1111 (9th Cir. 2015). However, due to the “quasi jurisdictional
18 nature” of sovereign immunity, a defendant may waive a challenge to jurisdiction on
19 that ground “if it does not invoke its immunity in a timely fashion and takes actions
20 indicating consent to the litigation.” *Pistor*, 791 F.3d at 1111. “Once challenged,
21 the party asserting subject matter jurisdiction has the burden of proving its

1 existence.” *Miller v. Wright*, 705 F.3d 919, 923 (9th Cir. 2013) (quoting *Robinson v.*
2 *United States*, 586 F.3d 683, 685 (9th Cir. 2009)).

3 A district court resolving a challenge to subject matter jurisdiction need not
4 presume the truthfulness of a plaintiff’s allegations and may “‘hear evidence
5 regarding jurisdiction’ and ‘resolv[e] factual disputes where necessary.’” *Pistor*,
6 791 F.3d at 1111 (quoting *Robinson*, 586 F.3d 685)).

7 ***Fed. R. Civ. P. 12(b)(6)***

8 When a defendant challenges a complaint’s sufficiency under Fed. R. Civ. P.
9 12(b)(6), the court must determine whether the complaint bears “sufficient factual
10 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
11 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible when the plaintiff
12 pleads “factual content that allows the court to draw the reasonable inference that the
13 defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “In sum, for
14 a complaint to survive a motion to dismiss, the non-conclusory ‘factual content,’ and
15 reasonable inferences from that content, must be plausibly suggestive of a claim
16 entitling the plaintiff to relief.” *Moss v. United States Secret Serv.*, 572 F.3d 962,
17 969 (9th Cir. 2009).

18 In deciding a Rule 12(b)(6) motion to dismiss, a court “accept[s] factual
19 allegations in the complaint as true and construe[s] the pleadings in the light most
20 favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marin Ins. Co.*,
21 519 F.3d 1025, 1031 (9th Cir. 2008). However, a court need not “assume the truth

1 of legal conclusions merely because they are cast in the form of factual allegations.”
2 *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam) (internal
3 quotation omitted).

4 DISCUSSION

5 *Exhaustion of Remedies*

6 In seeking a declaratory judgment, Plaintiffs ask this Court to determine that
7 the Tribal Court may not exercise jurisdiction over them with respect to the Tribes’
8 civil lawsuit. This inquiry presents a federal question under 28 U.S.C. § 1331.
9 *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857
10 (1985). However, to successfully invoke the Court’s jurisdiction under section
11 1331, considerations of comity require Plaintiffs first to exhaust their tribal court
12 remedies. *Id.* at 857; *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 478
13 (1999).

14 Where colorable questions of tribal jurisdiction exist, a plaintiff must exhaust
15 tribal remedies before pursuing relief in federal court. *Atwood v. Fort Peck Tribal*
16 *Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008); *Stock W. Corp. v. Taylor*, 964
17 F. 2d 912, 919–20 (9th Cir. 1992). In this context, the Court considers whether
18 Defendants’ assertion of sovereign immunity presents a colorable question of tribal
19 jurisdiction.

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Sovereign Immunity

“As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). A tribe cannot impliedly waive its sovereign immunity; the waiver must be “unequivocally expressed.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

Indian tribes “retain legislative and adjudicative jurisdiction to provide for disposition of reserved lands and to regulate activities on those lands.” *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1131 (9th Cir. 2006). There “‘is no simple test for determining whether tribal court jurisdiction exists.’” *Id.* at 1130 (quoting *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989)). Although, generally, a tribe’s inherent sovereign powers do not extend to the activities of nonmembers of the tribe, the United States Supreme Court articulated two exceptions to that principle in *Montana v. United States*, 450 U.S. 544 (1981). *Id.* The first *Montana* exception is relevant here and recognizes that tribes retain civil jurisdiction to “regulate, through taxation licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” 450 U.S. at 565–66. A tribe’s adjudicative jurisdiction over nonmembers may not exceed its regulatory jurisdiction. *Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802, 814 (9th Cir. 2011).

1 In resolving the instant motion, the Court first finds that the Tribal Court has
2 not yet determined whether it has authority to exercise personal jurisdiction over
3 Plaintiffs. *See* ECF No. 9-9 at 3. More specifically, the Tribal Court must make
4 factual findings to determine whether the corporate veil should be pierced, which
5 would then provide for personal jurisdiction over the Plaintiffs in the Tribal Court.
6 *See id.* Therefore, the Court finds that Plaintiffs have not exhausted their tribal
7 remedies, because the issue of whether the Tribal Court has personal jurisdiction
8 over the Plaintiffs has not been resolved.

9 Second, the Court finds that, due to Plaintiffs' failure to exhaust tribal
10 remedies, the jurisdictional issue posed by Defendants' assertion of sovereign
11 immunity is not yet before the Court. At this juncture, the Court must determine
12 only whether the tribal court has a colorable claim to exercising jurisdiction over
13 Defendants. *See Atwood*, 513 F.3d at 948; *Stock W. Corp*, 964 F. 2d at 919–20.

14 The information before this Court indicates that the civil lawsuit against
15 Plaintiffs proceeding in Tribal Court arises out of Plaintiffs' commercial dealing on
16 the reservation with the Tribes. *See* ECF Nos. 9-1, 9-2, and 9-9. The alleged breach
17 of a contract that was formed with the Tribes at tribal headquarters fits naturally
18 within the first *Montana* exception, recognizing tribal civil jurisdiction concerning
19 "the activities of nonmembers who enter consensual relationships with the tribe or
20 its members, through commercial dealing, contracts, leases, or other arrangements."
21 450 U.S. at 565–66. Therefore, the Court finds that there is a colorable claim to

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1 tribal jurisdiction, and, thus, tribal sovereign immunity, that must be resolved at the
2 tribal level in the first instance. *See Smith*, 434 F.3d at 1131 n. 1; *see also Nevada v.*
3 *Hicks*, 533 U.S. 353, 360 (2001) (indicating that courts should consider whether the
4 events giving rise to the action took place on tribal land).

5 A federal district court has discretion to determine whether a case should be
6 stayed or dismissed while tribal remedies are exhausted. *National Farmers Union*
7 *Ins. Cos.*, 471 U.S. at 857. Here, the Court finds that the considerations of
8 convenience and fairness to the parties, the underlying issue of comity, and judicial
9 economy all favor dismissal. Specifically, the Court finds it inappropriate and
10 imprudent to retain any role in this matter, such as requiring the parties to submit
11 status reports during a stay, given the Tribal Court's entitlement to determining the
12 jurisdictional issue in the first instance. *See Iowa Mut., Ins. Co. v. LaPlante*, 480
13 U.S. 9, 16 (1985) (recognizing that exhaustion of tribal remedies serves to prevent
14 federal courts from "impairing [tribal courts'] authority over reservation affairs").

15 Therefore, **IT IS HEREBY ORDERED:**

16 1. Defendants' Motion to Dismiss, **ECF No. 8**, is **GRANTED**.

17 2. This matter is **dismissed without prejudice**, and without costs or fees
18 for any party, for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P.
19 12(b)(1). The District Court Clerk shall enter a judgment of dismissal
20 without prejudice.

3. All upcoming hearings and deadlines in this matter, if any, are **vacated**, and any pending motions are **denied as moot**.

IT IS SO ORDERED. The District Court Clerk is directed to enter this Order, enter judgment of dismissal without prejudice as directed, provide copies to counsel, and **close the file.**

DATED November 15, 2019.

s/ Rosanna Malouf Peterson
 ROSANNA MALOUF PETERSON
 United States District Judge